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A BILL FOR AN ACT

RELATING TO EMPLOYMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The current labor laws are not uniform in their
2 definition of "employment" and may result in varying
3 determinations regarding the relationship between an employer
4 and an individual. The purpose of this Act is to ensure that
5 all programs under the department of labor and industrial
6 relations consistently apply the same criteria in determining
7 whether an employment relationship exists.

8 SECTION 2. Chapter 378, Hawaii Revised Statutes, is
9 amended by adding to part II a new section to be appropriately
10 designated and to read as follows:

11 "§378- **Employment relationship determination.** Services
12 performed by an individual for wages or under any contract of
13 hire shall be deemed to be employment subject to this part
14 unless and until it is shown to the satisfaction of the
15 department that:

16 (1) The individual has been and will continue to be free
17 from control or direction over the performance of such

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1 service, both under the individual's contract of hire
2 and in fact; and

3 (2) The service is either outside the usual course of the
4 business for which the service is performed or that
5 the service is performed outside of all the places of
6 business of the enterprise for which the service is
7 performed; and

8 (3) The individual is customarily engaged in an
9 independently established trade, occupation,
10 profession, or business of the same nature as that
11 involved in the contract of service."

12 SECTION 3. Chapter 378, Hawaii Revised Statutes, is
13 amended by adding to part III a new section to be appropriately
14 designated and to read as follows:

15 "**§378- Employment relationship determination.** Services
16 performed by an individual for wages or under any contract of
17 hire shall be deemed to be employment subject to this part
18 unless and until it is shown to the satisfaction of the
19 department that:

20 (1) The individual has been and will continue to be free
21 from control or direction over the performance of such

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1 service, both under the individual's contract of hire
2 and in fact; and

3 (2) The service is either outside the usual course of the
4 business for which the service is performed or that
5 the service is performed outside of all the places of
6 business of the enterprise for which the service is
7 performed; and

8 (3) The individual is customarily engaged in an
9 independently established trade, occupation,
10 profession, or business of the same nature as that
11 involved in the contract of service."

12 SECTION 4. Chapter 387, Hawaii Revised Statutes, is
13 amended by adding a new section to be appropriately designated
14 and to read as follows:

15 "**§387- Employment relationship determination.** Except
16 where services are specifically and expressly excluded from
17 "employment" under section 387-1, services performed by an
18 individual for wages or under any contract of hire shall be
19 deemed to be employment subject to this chapter unless and until
20 it is shown to the satisfaction of the department that:

21 (1) The individual has been and will continue to be free
22 from control or direction over the performance of such

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1 service, both under the individual's contract of hire
2 and in fact; and

3 (2) The service is either outside the usual course of the
4 business for which the service is performed or that
5 the service is performed outside of all the places of
6 business of the enterprise for which the service is
7 performed; and

8 (3) The individual is customarily engaged in an
9 independently established trade, occupation,
10 profession, or business of the same nature as that
11 involved in the contract of service."

12 SECTION 5. Chapter 388, Hawaii Revised Statutes, is
13 amended by adding a new section to be appropriately designated
14 and to read as follows:

15 "**§388- Employment relationship determination.** Services
16 performed by an individual for wages or under any contract of
17 hire shall be deemed to be employment subject to this chapter
18 unless and until it is shown to the satisfaction of the
19 department that:

20 (1) The individual has been and will continue to be free
21 from control or direction over the performance of such

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1 service, both under the individual's contract of hire
2 and in fact; and

3 (2) The service is either outside the usual course of the
4 business for which the service is performed or that
5 the service is performed outside of all the places of
6 business of the enterprise for which the service is
7 performed; and

8 (3) The individual is customarily engaged in an
9 independently established trade, occupation,
10 profession, or business of the same nature as that
11 involved in the contract of service."

12 SECTION 6. Chapter 390, Hawaii Revised Statutes, is
13 amended by adding a new section to be appropriately designated
14 and to read as follows:

15 "**§390- Employment relationship determination.** Services
16 performed by an individual for wages or under any contract of
17 hire shall be deemed to be employment subject to this chapter
18 unless and until it is shown to the satisfaction of the
19 department that:

20 (1) The individual has been and will continue to be free
21 from control or direction over the performance of such
22 service, both under the individual's contract of hire
23 and in fact; and

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(2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service."

SECTION 7. Chapter 398, Hawaii Revised Statutes, is amended by adding to part I a new section to be appropriately designated and to read as follows:

"§398- Employment relationship determination. Services
performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the department that:

(1) The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact; and

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1 (2) The service is either outside the usual course of the
2 business for which the service is performed or that
3 the service is performed outside of all the places of
4 business of the enterprise for which the service is
5 performed; and

6 (3) The individual is customarily engaged in an
7 independently established trade, occupation,
8 profession, or business of the same nature as that
9 involved in the contract of service."

10 SECTION 8. Section 378-26, Hawaii Revised Statutes, is
11 amended by adding two new definitions to be appropriately
12 inserted and to read as follows:

13 "Employment" includes service performed for wages or under
14 any contract of hire, written or oral, express or implied.

15 "Wages" means compensation for services rendered by an
16 employee, whether the amount is determined on a time, task,
17 piece, commission, salary, or other basis of calculation. It
18 shall include the reasonable cost, as determined by the
19 department under chapter 387, to the employer of furnishing an
20 employee with board, lodging, or other facilities if such board,
21 lodging, or other facilities are customarily furnished by the

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1 employer to the employer's employees, but shall not include tips
2 or gratuities of any kind."

3 SECTION 9. Section 378-31, Hawaii Revised Statutes, is
4 amended by adding a new definition to be appropriately inserted
5 and to read as follows:

6 "Employment" includes service performed for wages or under
7 any contract of hire, written or oral, express or implied."

8 SECTION 10. Section 378-31, Hawaii Revised Statutes, is
9 amended by amending the definition of "wages" to read as
10 follows:

11 "Wages" means compensation [~~for labor~~] or services
12 rendered by an employee, whether the amount is determined on
13 a time, task, piece, commission, salary, or other basis of
14 calculation. It shall include the reasonable cost, as
15 determined by the [~~director~~] department under chapter 387, to
16 the employer of furnishing an employee with board, lodging, or
17 other facilities if such board, lodging, or other facilities are
18 customarily furnished by the employer to the employer's
19 employees, but shall not include tips or gratuities of any
20 kind."

21 SECTION 11. Section 386-73.5, Hawaii Revised Statutes, is
22 amended to read as follows:

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1 **"§386-73.5 Proceedings to determine employment and**
2 **coverage.** The [~~director of labor and industrial relations]~~
3 department shall have original jurisdiction over all
4 controversies and disputes over employment and coverage under
5 this chapter. Except in cases where services are specifically
6 and expressly excluded from "employment" under section 386-1, it
7 shall be presumed that coverage applies unless [~~the party~~
8 ~~seeking exclusion is able to establish under both the control~~
9 ~~test and the relative nature of the work test that coverage is~~
10 ~~not appropriate under this chapter.]~~ and until it can be shown
11 to the satisfaction of the department that:

12 (1) The individual has been and will continue to be free
13 from control or direction over the performance of such
14 service, both under the individual's contract of hire
15 and in fact; and

16 (2) The service is either outside the usual course of the
17 business for which the service is performed or that
18 the service is performed outside of all the places of
19 business of the enterprise for which the service is
20 performed; and

21 (3) The individual is customarily engaged in an
22 independently established trade, occupation,

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1 profession, or business of the same nature as that
2 involved in the contract of service.

3 There shall be a right of appeal from decisions of the
4 ~~[director]~~ department to the appellate board and thence to the
5 supreme court."

6 SECTION 12. Section 387-1, Hawaii Revised Statutes, is
7 amended to read as follows:

8 **"§387-1 Definitions.** As used in this chapter:

9 "Agriculture" means agriculture as defined in section 3(f)
10 of the Federal Fair Labor Standards Act of 1938, or as the same
11 may be amended from time to time.

12 "Department" means the department of labor and industrial
13 relations.

14 "Director" means the director of labor and industrial
15 relations.

16 ~~["Employ" includes to permit or suffer to work.]~~

17 "Employee" includes any individual employed by an
18 employer~~[, but shall not include any individual employed:~~

19 ~~(1) At a guaranteed compensation totaling \$2,000 or more a~~
20 ~~month, whether paid weekly, biweekly, or monthly;~~

21 ~~(2) In agriculture for any workweek in which the employer~~
22 ~~of the individual employs less than twenty employees~~

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- 1 ~~or in agriculture for any workweek in which the~~
2 ~~individual is engaged in coffee harvesting;~~
- 3 ~~(3) In domestic service in or about the home of the~~
4 ~~individual's employer or as a house parent in or about~~
5 ~~any home or shelter maintained for child welfare~~
6 ~~purposes by a charitable organization exempt from~~
7 ~~income tax under section 501 of the federal Internal~~
8 ~~Revenue Code;~~
- 9 ~~(4) By the individual's brother, sister, brother in law,~~
10 ~~sister in law, son, daughter, spouse, parent, or~~
11 ~~parent in law;~~
- 12 ~~(5) In a bona fide executive, administrative, supervisory,~~
13 ~~or professional capacity or in the capacity of outside~~
14 ~~salesperson or as an outside collector;~~
- 15 ~~(6) In the propagating, catching, taking, harvesting,~~
16 ~~cultivating, or farming of any kind of fish,~~
17 ~~shellfish, crustacean, sponge, seaweed, or other~~
18 ~~aquatic forms of animal or vegetable life, including~~
19 ~~the going to and returning from work and the loading~~
20 ~~and unloading of such products prior to first~~
21 ~~processing;~~
- 22 ~~(7) As a seaman;~~

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~~(8) As a driver or a vehicle carrying passengers for hire
operated solely on call and from a fixed stand;~~

~~(9) As a golf caddy;~~

~~(10) By a nonprofit school during the time such individual
is a student attending such school;~~

~~(11) In any capacity if by reason of the employee's
employment in such capacity and during the term
thereof the minimum wage which may be paid the
employee or maximum hours which the employee may work
during any workweek without the payment of overtime,
are prescribed by the federal Fair Labor Standards Act
of 1938, as amended, or as the same may be further
amended from time to time; provided that if the
minimum wage which may be paid the employee under the
Fair Labor Standards Act for any workweek is less than
the minimum wage prescribed by section 387-2, then
section 387-2 shall apply in respect to the employees
for such workweek; provided further that if the
maximum workweek established for the employee under
the Fair Labor Standards Act for the purposes of
overtime compensation is higher than the maximum
workweek established under section 387-3, then section~~

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1 ~~387-3 shall apply in respect to such employee for such~~
2 ~~workweek; except that the employee's regular rate in~~
3 ~~such an event shall be the employee's regular rate as~~
4 ~~determined under the Fair Labor Standards Act;~~

5 ~~(12) As a seasonal youth camp staff member in a resident~~
6 ~~situation in a youth camp sponsored by charitable,~~
7 ~~religious, or nonprofit organizations exempt from~~
8 ~~income tax under section 501 of the federal Internal~~
9 ~~Revenue Code or in a youth camp accredited by the~~
10 ~~American Camping Association; or~~

11 ~~(13) As an automobile salesperson primarily engaged in the~~
12 ~~selling of automobiles or trucks if employed by an~~
13 ~~automobile or truck dealer licensed under chapter~~
14 ~~437].~~

15 "Employer" includes any individual, partnership,
16 association, corporation, business trust, legal representative,
17 or any organized group of persons, acting directly or indirectly
18 in the interest of an employer in relation to an employee, but
19 shall not include the State or any political subdivision thereof
20 or the United States.

21 "Employment" includes service performed for wages or under
22 any contract of hire, written or oral, express or implied, but

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1 "employment" shall not include service performed by any
2 individual:

3 (1) At a guaranteed compensation totaling \$2,000 or more a
4 month, whether paid weekly, biweekly, or monthly;

5 (2) In agriculture for any workweek in which the employer
6 of the individual employs less than twenty employees
7 or in agriculture for any workweek in which the
8 individual is engaged in coffee harvesting;

9 (3) In domestic service in or about the home of the
10 individual's employer or as a house parent in or about
11 any home or shelter maintained for child welfare
12 purposes by a charitable organization exempt from
13 income tax under section 501 of the federal Internal
14 Revenue Code;

15 (4) By the individual's brother, sister, brother-in-law,
16 sister-in-law, son, daughter, spouse, parent, or
17 parent-in-law;

18 (5) In a bona fide executive, administrative, supervisory,
19 or professional capacity or in the capacity of outside
20 salesperson or as an outside collector;

21 (6) In the propagating, catching, taking, harvesting,
22 cultivating, or farming of any kind of fish,

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1 shellfish, crustacean, sponge, seaweed, or other
2 aquatic forms of animal or vegetable life, including
3 the going to and returning from work and the loading
4 and unloading of such products prior to first
5 processing;

6 (7) As a seaman;

7 (8) As a driver or a vehicle carrying passengers for hire
8 operated solely on call and from a fixed stand;

9 (9) As a golf caddy;

10 (10) By a nonprofit school during the time such individual
11 is a student attending such school;

12 (11) In any capacity if by reason of the employee's
13 employment in such capacity and during the term
14 thereof the minimum wage that may be paid the employee
15 or maximum hours that the employee may work during any
16 workweek without the payment of overtime are
17 prescribed by the federal Fair Labor Standards Act of
18 1938, as amended, or as the same may further amended
19 from time to time; provided that, if the minimum wage
20 that may be paid the employee under the Fair Labor
21 Standards Act for any workweek is less than the
22 minimum wage prescribed by section 387-2, then section

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1 387-2 shall apply in respect to the employees for such
2 workweek; provided further that, if the maximum
3 workweek established for the employee under the Fair
4 Labor Standards Act for the purposes of overtime
5 compensation is higher than the maximum workweek
6 established under section 387-3, then section 387-3
7 shall apply in respect to such employee for such
8 workweek; except that the employee's regular rate in
9 such an event shall be the employee's regular rate as
10 determined under the Fair Labor Standards Act;

11 (12) As a seasonal youth camp staff member in a resident
12 situation in a youth camp sponsored by a charitable,
13 religious, or nonprofit organization exempt from
14 income tax under section 501 of the federal Internal
15 Revenue Code or in a youth camp accredited by the
16 American Camping Association; or

17 (13) As an automobile salesperson primarily engaged in the
18 selling of automobiles or trucks if employed by an
19 automobile or truck dealer licensed under chapter 437.

20 "Industry" means a trade, business, industry, or branch
21 thereof, or group of industries in which individuals are
22 employed.

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1 "Seasonal pursuit" means one in which it is customary in
2 each year for the volume of employment in such pursuit to be
3 substantially increased during a regularly recurring period or
4 periods of seasonal activity, and in the remainder of the year,
5 owing to climate or natural conditions, for the volume of
6 employment to be substantially decreased. Periods of seasonal
7 activity shall be considered as "regularly recurring", within
8 the meaning of this paragraph, notwithstanding that such periods
9 may vary from year to year.

10 "Tipped employee" means any employee engaged in an
11 occupation in which the employee customarily and regularly
12 receives more than \$20 a month in tips.

13 ~~["Wage" means (except as the department may provide under~~
14 ~~section 387-11) legal tender of the United States or checks on~~
15 ~~banks convertible into cash on demand at full face value thereof~~
16 ~~and in addition thereto the reasonable cost as determined by the~~
17 ~~department, to the employer of furnishing an employee with~~
18 ~~board, lodging, or other facilities if such board, lodging, or~~
19 ~~other facilities are customarily furnished by such employer to~~
20 ~~the employer's employees. Except for the purposes of the last~~
21 ~~sentence of section 387-2, "wage" shall not include tips or~~
22 ~~gratuities of any kind.]~~

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1 "Wages" means (except as the department may provide under
2 section 387-11) compensation for services rendered by an
3 employee, whether the amount is determined on a time, task,
4 piece, commission, salary, or other basis of calculation. It
5 shall include the reasonable cost, as determined by the
6 department, to the employer of furnishing an employee with
7 board, lodging, or other facilities if such board, lodging, or
8 other facilities are customarily furnished by the employer to
9 the employer's employees. Except for the purposes of the last
10 sentence of section 387-2, "wages" shall not include tips or
11 gratuities of any kind."

12 "Week" or "workweek" means a fixed and regularly recurring
13 period of seven consecutive days."

14 SECTION 13. Section 388-1, Hawaii Revised Statutes, is
15 amended by adding a new definition to be appropriately inserted
16 and to read as follows:

17 "Employment" includes service performed for wages or under
18 any contract of hire, written or oral, express or implied."

19 SECTION 14. Section 388-1, Hawaii Revised Statutes, is
20 amended by amending the definition of "wages" to read as
21 follows:

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1 ""Wages" means compensation [~~for labor~~] or services
2 rendered by an employee, whether the amount is determined on
3 a time, task, piece, commission, salary, or other basis of
4 calculation. It shall include the reasonable cost, as
5 determined by the [~~director~~] department under chapter 387, to
6 the employer of furnishing an employee with board, lodging, or
7 other facilities if such board, lodging, or other facilities are
8 customarily furnished by the employer to the employer's
9 employees, but shall not include tips or gratuities of any kind,
10 provided that for the purposes of section 388-6, "wages" shall
11 include tips or gratuities of any kind."

12 SECTION 15. Section 390-1, Hawaii Revised Statutes, is
13 amended by adding two new definitions to be appropriately
14 inserted and to read as follows:

15 "Employment" includes service performed for wages or under
16 any contract of hire, written or oral, express or implied.

17 "Wages" means compensation for services rendered by an
18 employee, whether the amount is determined on a time, task,
19 piece, commission, salary, or other basis of calculation. It
20 shall include the reasonable cost, as determined by the
21 department under chapter 387, to the employer of furnishing an
22 employee with board, lodging, or other facilities if such board,

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1 lodging, or other facilities are customarily furnished by the
2 employer to the employer's employees, but shall not include tips
3 or gratuities of any kind."

4 SECTION 16. Section 392-21.5, Hawaii Revised Statutes, is
5 amended to read as follows:

6 **"§392-21.5 Proceedings to determine employment and**
7 **coverage.** The ~~[director]~~ department shall have original
8 jurisdiction over all controversies and disputes over employment
9 and coverage under this chapter. Except in cases where services
10 are specifically and expressly excluded from "employment" under
11 section 392-5, it shall be presumed that coverage applies unless
12 ~~[the party seeking exclusion is able to establish under both the~~
13 ~~control test and the relative nature of the work test that~~
14 ~~coverage is not appropriate under this chapter.]~~ and until it can
15 be shown to the satisfaction of the department:

16 (1) The individual has been and will continue to be free
17 from control or direction over the performance of such
18 service, both under the individual's contract of hire
19 and in fact; and

20 (2) The service is either outside the usual course of the
21 business for which the service is performed or that
22 the service is performed outside of all the places of

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1 business of the enterprise for which the service is
2 performed; and

3 (3) The individual is customarily engaged in an
4 independently established trade, occupation,
5 profession, or business of the same nature as that
6 involved in the contract of service.

7 There shall be a right of appeal from decisions of the
8 ~~[director]~~ department to the circuit court and thence to the
9 supreme court."

10 SECTION 17. Section 398-1, Hawaii Revised Statutes, is
11 amended by adding a new definition to be appropriately inserted
12 and to read as follows:

13 "Wages" means compensation for services rendered by an
14 employee, whether the amount is determined on a time, task,
15 piece, commission, salary, or other basis of calculation. It
16 shall include the reasonable cost, as determined by the
17 department under chapter 387, to the employer of furnishing an
18 employee with board, lodging, or other facilities if such board,
19 lodging, or other facilities are customarily furnished by the
20 employer to the employer's employees, but shall not include tips
21 or gratuities of any kind."

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SECTION 18. Act 202, Session laws of Hawaii 2004, is amended by amending section 43 to read as follows:

"SECTION 43. Section 386-73.5, Hawaii Revised Statutes, is amended to read as follows:

"§386-73.5 Proceedings to determine employment and coverage. The ~~[director of labor and industrial relations]~~ department shall have original jurisdiction over all controversies and disputes over employment and coverage under this chapter. Except in cases where services are specifically and expressly excluded from "employment" under section 386-1, it shall be presumed that coverage applies unless ~~[the party seeking exclusion is able to establish under both the control test and the relative nature of the work test that coverage is not appropriate under this chapter.]~~ and until it can be shown to the satisfaction of the department that:

(1) The individual has been and will continue to be free from control or direction over the performance of such service, both under the individual's contract of hire and in fact; and

(2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of

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1 business of the enterprise for which the service is
2 performed; and

3 (3) The individual is customarily engaged in an
4 independently established trade, occupation,
5 profession, or business of the same nature as that
6 involved in the contract of service.

7 There shall be a right of appeal from decisions of the [~~director~~]
8 department to the appellate board and thence to the intermediate
9 appellate court, subject to chapter 602."

10 SECTION 19. Act 202, Session Laws of Hawaii 2004, is
11 amended by amending section 46 to read as follows:

12 "SECTION 46. Section 386-21.5, Hawaii Revised Statutes, is
13 amended to read as follows:

14 "**§392-21.5 Proceedings to determine employment and coverage.**

15 The [~~director of labor and industrial relations~~] department shall
16 have original jurisdiction over all controversies and disputes
17 over employment and coverage under this chapter. Except in cases
18 where services are specifically and expressly excluded from
19 "employment" under section 392-5, it shall be presumed that
20 coverage applies unless [~~the party seeking exclusion is able to~~
21 ~~establish under both the control test and the relative nature of~~
22 ~~the work test that coverage is not appropriate under this~~

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1 ~~chapter.]~~ and until it can be shown to the satisfaction of the
2 department that:

3 (1) The individual has been and will continue to be free
4 from control or direction over the performance of such
5 service, both under the individual's contract of hire
6 and in fact; and

7 (2) The service is either outside the usual course of the
8 business for which the service is performed or that
9 the service is performed outside of all the places of
10 business of the enterprise for which the service is
11 performed; and

12 (3) The individual is customarily engaged in an
13 independently established trade, occupation,
14 profession, or business of the same nature as that
15 involved in the contract of service.

16 There shall be a right of appeal from decisions of the [~~director~~]
17 department to the appellate board and thence to the intermediate
18 appellate court, subject to chapter 602."

19 SECTION 20. This Act does not affect rights and duties
20 that matured, penalties that were incurred, and proceedings that
21 were begun, before its effective date.

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1 SECTION 21. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 22. This Act shall take effect upon its approval.

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5 INTRODUCED BY: _____

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BY REQUEST

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